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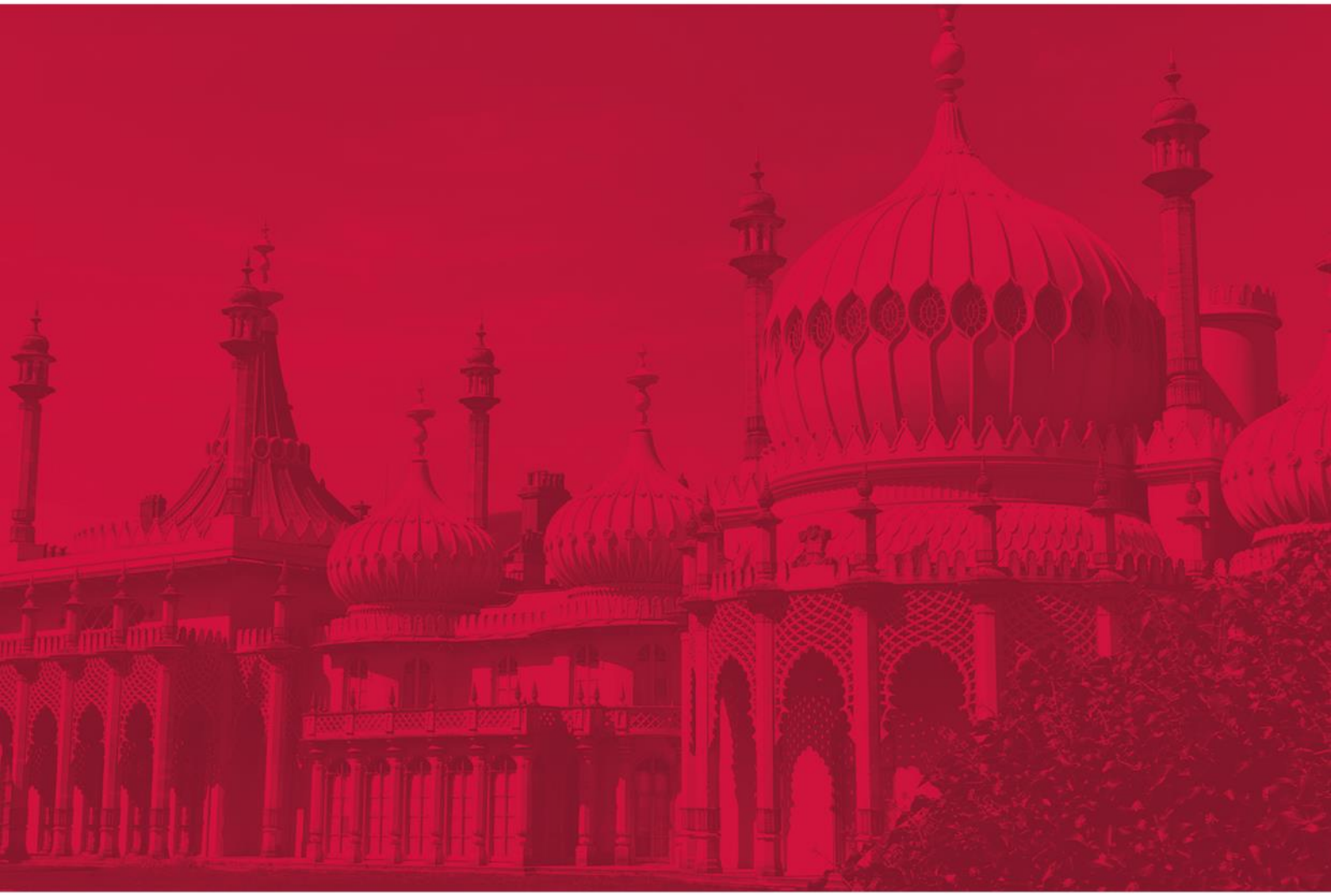

# An overview of recent caselaw in relation to pre & post nups and child maintenance

**Cerys Sayer**

**WC v HC (Financial Remedies Agreements) (Rev1) [2022] EWFC 22 (22 March 2022)**

*https://www.bailii.org/ew/cases/EWFC/HCJ/2022/22.html*

**Facts of the case:**

H was 55 years old, a Belgian national who grew up in Switzerland and from a very wealthy family. W was 52 and a UK national. They met in 2001, started living together in 2002/2003, and married on 3 September 2004. The marriage came to an end in 2019.

The parties had lived and worked in the city but started moving between there and Switzerland, where H then began to work for the family business and the W stopped working to have children.

The family lifestyle was largely funded by the generosity of H's very wealthy father albeit the provision of annual gifts was a tax efficient way of rewarding H for his work.

Prior to marriage, on 12 August 2004 the parties entered into, and fully executed, a Pre-Marital Agreement, followed thereafter by a supplemental agreement dated 2 September 2004 concerning child maintenance.

On 24 June 2017, H raised with W the idea of entering into a Post-Marital Agreement, to which W was clearly opposed from the outset. Nevertheless, both parties engaged lawyers, a first draft was prepared by H's solicitors on 21 July 2017, and the parties, and their lawyers, attended a without prejudice meeting on 8 August 2017 at the offices of W's solicitors, which lasted most of the day. Further correspondence ensued and on 22 August 2017 agreement was reached. Arrangements were made for the document to be signed on 29 August 2017. In the event, W declined to do so, although her solicitor signed the Certificate Annexe.

This case therefore raised issues both pre and post-marital agreement.

The W pleaded that she was unduly pressured into entering both and had not signed the latter.

The pertinent issues the court focussed on that we will focus on for today's purpose are:

i) The circumstances surrounding the Pre-Marital Agreement, and whether any weight should be attached to it.

ii) The circumstances surrounding the unsigned Post-Marital Agreement, and whether any weight should be attached to it.

**The Law:**

This case is a good place to start as Mr Justice Peel nicely encapsulates the applicable law in relation to:

i. Financial remedies generally, at paragraph 21, which I won't rehearse but replicate below, and
ii. The law in relation to Pre&Post-nups at paragraph 22 provides a snappy overview of the relevant law:

*21. The general law which I apply is as follows:*

*i) As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution;* ***Charman v Charman*** *[**2007] EWCA Civ 503**.*

*ii) The objective of the court is to achieve an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in* ***White v White*** *[**2000] 2 FLR 981**.*

*iii) There is no place for discrimination between husband and wife and their respective roles;* ***White v White*** *at 989C.*

*iv) In an evaluation of fairness, the court is required to have regard to the s25 criteria, first consideration being given to any child of the family.*

*v) S25A is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of* ***Miller v Miller; McFarlane v McFarlane*** *[**2006] 1 FLR 1186**.*

*vi) The three essential principles at play are needs, compensation and sharing;* ***Miller; McFarlane****.*

*vii) In practice, compensation is a very rare creature indeed. Since* ***Miller; McFarlane*** *it has only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in* ***RC v JC*** *[**2020] EWHC 466** (although there are one or two examples of its use on variation applications).*

*viii) Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail;* ***Charman v Charman.***

*ix) In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.*

*x) Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary;* ***Scatliffe v Scatliffe*** *[**2017] 2 FLR 933** at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in* ***K v L*** *[**2011] 2 FLR 980** at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.*

*xi) The evaluation by the court of the demarcation between marital and non-martial assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case;* ***Hart v Hart*** *[2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.*

*xii) Needs are an elastic concept. They cannot be looked at in isolation. In* ***Charman (supra)*** *at [70] the court said:*

> *"The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)".*

*xiii) The Family Justice Council in its Guidance on Financial Needs has stated that:*

> *"In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."*

*xiv) In* ***Miller/McFarlane*** *Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example,* ***G v G [2012] 2 FLR 48*** *and* ***BD v FD*** *[2017] 1 FLR 1420.*

*xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in* ***FF v KF*** *[2017] EWHC 1093 at [18];*

> *"The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".*

*xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in* ***N v F*** *[2011] 2 FLR 533 at [17-19].*

***The Law: Pre-Marital and Post-Marital Agreements***

**22.** ***I do not need to look beyond Radmacher v Granatino [2010] UKSC 42 from which the following essential propositions can be drawn:***

***i) There is no material distinction between an ante-nuptial agreement and a post-nuptial agreement (para 57).***

***ii) If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, "what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end" (para 69).***

***iii) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).***

***iv) The first question will be whether any of the standard vitiating factors, duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it (para 71). The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. (Para 72).***

***v) The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. (para 75).***

**On applying the facts to the Law**

- Going through the Judgement, I have highlighted the key parts which enabled the court to reach its decision and are worthwhile noting for future practice:

***The Pre-Marital Agreement***

28. *This Agreement was the product of discussions which lasted a number of months (the parties first discussed it in January 2004, their lawyers started corresponding in June 2004, and the first draft was prepared on 23 June 2004**). Both parties had the benefit of English and Swiss legal advice**; in W's case her English lawyers were Macfarlanes. It is dated 12 August 2004, about 3 weeks before the marriage, and signed by the parties**. The marriage had been delayed to enable a 3 week cooling off period after signing**. Equivalent Swiss documents were entered into. It is clear that the impetus for the agreement, as with so many pre-marital agreements, came from extended family, in this case H's father, who required its execution and made it plain that he would "take measures" if it was not signed. **Both parties' evidence was that had they not signed, the marriage would not have taken place**. As W's solicitors of the time said in correspondence, it was "always under the shadow of what [H's] father was prepared to agree". I was told that H's sister had disagreed with H's father about her own pre-marital agreement, and H's father refused to see her for years thereafter, such was his anger.*

29. ***The agreement itself contains certificates signed by each party's solicitor. The certificate of W's solicitor states: "[W] stated to me, and it appeared to me, that she entered into the***

***said agreement willingly and without any pressure, duress, undue influence or deception on the part of any other person, including [H]".***

30. *A letter dated 18 August 2004 from her solicitors stated that "[W] confirmed to us…that she was signing the agreement of her own free will. However, she also made clear that she had felt extremely stressed during the preceding weeks….", and for that reason the word "stress" had been removed from the solicitor's certificate. To my mind, this shows the care taken by W's solicitor to be satisfied of W's instructions when entering into the agreement.*

31. ***I am confident that both H and W were under pressure from H's father**. That is hardly surprising given that H's father was a man of immense wealth who saw it as his duty to ensure that the family wealth passed through the generations in a dynastic manner. Moreover, coming from a Swiss and B background, where such agreements were commonplace, it is likely that H's father was more comfortable with the notion of a pre-marital agreement than W, from an English background where, certainly at the time, such agreements were rare indeed. I am equally confident that W felt under stress and was uncomfortable with the process. The intended agreement was a source of tension for both W and H. **However, in my judgment, none of the vitiating factors set out in Radmacher apply and I see no reason to discard, or ignore ab initio, the Pre-Marital Agreement**:*

    *i**) I am satisfied that although W and H were under pressure, W was not under undue pressure to enter into it.** In almost every Pre or Post Marital Agreement one or other, or both, parties are under a degree of pressure, and emotions may run high. The collision of the excitement engendered by prospective marriage, and the hard realities of negotiating for the breakdown of such a marriage, can be acutely difficult for parties. Tension and disagreement may ensue. If, as here, one side of the family is applying pressure, the difficulties are accentuated. But in the end, each party has to make a choice and unless undue pressure can be demonstrated, the court will ordinarily uphold the agreement. In my judgment, W cannot so demonstrate here.*

    ***ii) It included clauses that the agreement was entered into "of their own free will without undue influence or duress" and that "they would not be getting married unless they had entered into the agreement".** I have already commented that their solicitors signed certificates to similar effect, and W's solicitor corresponded to H's solicitor saying that W was freely entering into the agreement.*

    ***iii) It was considered, discussed and negotiated over a period measured in months**. W had the benefit of lawyers in both England and Switzerland.*

    *iv) Immediately after the marriage, and in accordance with the agreement, 'X' Street and £1.3m were placed in joint names in accordance with the Pre-Marital Agreement. W thereby benefited from its immediate implementation.*

32. *I have already indicated that this document has largely been overtaken by events. **Nevertheless, of relevance is the exposition within the agreement of why the parties were entering into a Pre-Marital Agreement. It expressly recorded at Clause I that all dynastic property already acquired by H or acquired during the marriage should be free of claims by W save as necessary to implement the agreement, and that each should retain their own separate property.** The section "Genesis of the Agreement" at Clause K(i) specifically refers to the past receipt by H of family monies, and the anticipated future receipt of dynastic*

*assets which are intended to be excluded. Self-evidently, the agreement had one eye on the future wealth which was expected to cascade down to H.*

***The Post-Marital Agreement:***

33. *There are two main issues:*

*i) Whether W was placed under undue pressure such that it should be disregarded.*

*ii) Further, or alternatively, whether the fact that it was not signed by W, dictates that it should be disregarded.*

34. *The factual background, and circumstances, as I find them, are as follows:*

*i) By March/April 2017 the parties' plan for the children to be educated in England was settled, and the children were being prepared for the move.*

*ii) There was some dispute about whether W told H on one occasion that if he did not let her and the children go to London, she would divorce him. I suspect this was a product of misunderstanding. Probably W made unguarded comments which were misinterpreted by H. However it came about, I am confident that H was concerned about the possibility of the marriage coming to an end, even if that was not part of W's thinking at the time.*

*iii) H first raised with W the subject of a Post-Marital Agreement on 24 June 2017 i.e after the children's move to be educated in England had been agreed. Her opposition is clear from an email to H that very day**: "[H], just to confirm in writing what you have repeated to me verbally tonight; that unless I sign the documents you wish, namely a financial post-nup and post divorce custodial rights, you will not allow the children to attend school in the UK this autumn. Terrible we have come to this!".** H told me, and I accept, that the motivation for a Post-Marital Agreement came entirely from him. His father was not involved, beyond saying that he thought H was naïve to let W go to London, and expressing annoyance with W.*

*iv) I am satisfied that H told W she could not go to London without signing a Post-Marital Agreement. In so doing, he threw into doubt the London schooling arrangements which were in place. He also told W that he would only agree to her having a bigger house in London if she signed the agreement.*

*v) W, on or about 5 July 2017, instructed English solicitors, Hughes Fowler Carruthers. She also instructed Swiss lawyers. H likewise instructed lawyers in England and Switzerland. Despite W's reservations, they entered into negotiations.*

***vi) The first draft of a Post-Marital Agreement was supplied by H's solicitors on 21 July 2017.***

***vii) On 8 August 2017 the parties and their lawyers attended a without prejudice meeting which lasted the full day. No heads of agreement were signed. I was not made privy to the course of the discussions, although it appears that significant progress was made, and W seemed to be under the impression in her evidence that agreement had been reached on headline numbers.***

*viii) According to W (and a WhatsApp communication with a close friend to whom she unburdened refers to this), on 16 Aug 2017 H told her that if she tried to leave the country without signing the documents, he would call the police. Having heard the parties I am confident that H told W he could go to the police, not that he would do so. This was a misunderstanding during overwrought and emotional conversations. In any event, even though W did not sign the document, she left unimpeded on 30 August 2017 to attend a school induction day with Child A, returned to Switzerland immediately afterwards and, a day or two later flew to London permanently with the children. H saw them off at the airport and did not call the police or attempt to stop them.*

***ix) During this period there were some exchanges by WhatsApp between W and a close friend which, it is said, are corroborative of the pressure W felt under. For example, on 4 August 2017 W said that the pressure was unbearable, on 17 August 2017 she referred to her "head spinning", on 20 August 2017 she said, "this has been traumatic" and on 28 August 2017 she told her friend of feeling "blackmailed…powerless…cornered and tired and abused". I regard these communications from W as being secondary, rather than primary material. They are indicative of her state of mind but do not really add to that which is apparent from what I have read, and W's own oral evidence, that (a) she wanted to leave Switzerland with the children, (b) she felt under real pressure to sign the agreement to achieve her aim, (c) she was anxious, and (d) relations between her and H were low.***

***x) On 21 August 2017 H's solicitors sent a revised draft agreement.***

***xi) On 22 August 2017 W's solicitors wrote saying "Thank you for your letter of yesterday's date and for providing a final version of the agreement, the terms of which are approved". In my judgment, an agreement was reached at that point, notwithstanding W in evidence being a little reluctant to so concede; she told me that "I did not approve the terms, but if the letter was sent in my name, I stand by it". The document was comprehensive, clear and detailed. The reasoning from W's perspective, as the letter stated, was that "[W's] primary goal is to ensure the children are able to settle in England for the start of the school year" which, I note, she subsequently achieved.***

*xii) On 23 August 2017, H's solicitors replied acknowledging the agreement which had been reached.*

*xiii) The intention was, as before, for mirror agreements in Switzerland to be drawn up.*

***xiv) Arrangements were made for the agreement to be signed by the parties before a notary in Switzerland on 29 August 2017 at 4pm. That morning W saw a different Swiss lawyer. At about lunchtime W, apparently on the advice of the Swiss lawyer, but not mentioned to H, went to see a GP who wrote a letter (curiously not disclosed until April 2021) in which he certified that W was showing "true mental distress" with a "major anxiety component" and as a result the mental attitude required for calm decision making "is not currently fulfilled". I do not doubt that W felt anxious and worried at that time; she was about to sign an important document, and wanted to leave forthwith to England. But agreement had been reached on 22 August 2017 (a week before) and I am not persuaded that this medical note undermines the agreement reached one week previously.***

*xv) At about 1.30pm (possibly after she had seen the GP), W told H by email that she would not attend to sign, referring in particular to being worried about signing mirror Swiss documents which she had not yet seen:*

> *"I really am unhappy about signing the English documents today without even seeing the Swiss documents…".*

*xvi) She sent a follow up email saying that she had no intention of renegotiating, and that she planned to sign the document, although she did not in fact do so:*

> ***"I am not looking to change the English documents, or re-negotiate them, I just want to be able to sign them as a package whenever all the documents are ready, and without the time pressures of having to do so before the children are allowed to begin school".***
>
> ***"I want to reassure you that I have no intention of getting to London to start renegotiating the post nup….There is no tactic…"***

*xvii) W did not sign, although her solicitor signed a certificate confirming that she had given W independent legal advice on the agreement.*

*xviii) It is of note, in my judgment, that nowhere during these events of 29 August 2017 did W complain about the circumstances in which agreement had been reached on 22 August 2017, or the terms thereof. Her concern was not being able to see the Swiss mirror documents before signing.*

*xix) As I have indicated, on 30 August 2017 W flew to London with Child A for his school induction day; H travelled to the airport to see them off just as they were going through the departure gates. They returned that weekend. A day or two later W and the children travelled permanently to England; H accompanied them to the airport.*

*xx) In a sense, W achieved her goal. She was able to leave for London with the children. She was not prevented from doing so by H. And, ultimately, she did not sign the agreement.*

35. *Although there is no doubt W was placed under pressure by H to sign (as he fairly acknowledged in his oral evidence) I reject the contention that W was placed under undue (my emphasis) pressure, let alone duress, to sign, as was urged upon me by her counsel in closing submissions. Both parties were under pressure for different reasons. It cannot have been an easy process for either. W wanted to move to London and start afresh with the children. From her point of view the Post-Marital Agreement represented a significant potential block; either she signed, or H would not agree to the planned move. H raised the need for a Post-Marital Agreement only after the plans had been laid, and school places secured; W did not want to let the children down. For H, there were concerns about W and the children leaving their home in Switzerland, the impact on their relationship as a couple and the possible impact on the family as a whole. As he saw it, there were other available options in Switzerland, and he was uncomfortable about the move to London; his father's attitude probably contributed.*

36. ***I readily accept that each party was under pressure. I readily accept that both parties (particularly W) were tense and anxious. I reject the contention (raised in W's statement but not really pursued in oral evidence) that this was part of a long standing pattern of controlling and domineering behaviour by H which in some way overbore her will, and I***

***reject W's case that the agreement was reached as a result of undue pressure. The parties were in communication, through their lawyers, about the Post-Marital Agreement for some two months. The document (to which W assented in correspondence) explicitly records at clause 8.8 that each party enters into the agreement "of their own free will without undue influence or duress and without any promise or representation other than as set out in the Agreement, and neither has suffered inequality of bargaining power". W's solicitor signed it. At no time did her solicitors say that the agreement was being conducted under undue pressure. I have not seen or heard anything to suggest that she thought at the time that the terms were unfair; rather, her concern seems to have been the lack of mirror Swiss documents. In the end, W elected not to sign, as was her right.***

37. *W says (and it does not seem to be disputed) that thereafter there were continuing discussions (which she describes as negotiations) between the parties in respect of the Post-Marital Agreement. During this period, she was provided with the Swiss mirror documents about which she had previously been exercised. Thus, she says, no agreement can in fact have been reached because otherwise why would they have been in ongoing discussions? I reject that submission:*

    *i) The post agreement discussions were privileged, and the parties have not waived privilege to permit me to see them. I have no idea what they contain and whether they do, as W says, represent an ongoing chain of negotiations which did not achieve consensus on a final version of the Post-Marital Agreement.*

    ***ii) Far from undermining the agreement, in my view the fact that some form of without prejudice discussion took place after the agreement was reached demonstrates vividly that agreement had in fact been reached; otherwise, why attempt to renegotiate it?***

    *iii) In any event, the correspondence to which I have referred explicitly confirms that agreement was reached on 22 August 2017. If there was an attempt to re-negotiate, nothing before me suggests that a supplemental agreement, or variation of agreement, was entered into.*

38. *A more powerful argument for W, in my judgment, is that the agreement was not in fact signed by the parties. Article 1 provides that "This Agreement shall come into force on the date upon which the last of [H] and [W] signed the Agreement", and the preamble to the Post-Marital Agreement contains the usual notice "Do not sign this agreement unless you intend to be bound by its terms".*

***39. Normally, an agreement will take effect as a result of both parties signing. The principle of autonomy, articulated by Mostyn J in BN v MA [2014] EWHC 2450 when emphasising the importance of a party signing (and, I suggest, by corollary, not signing) is relevant. I would not want, however, to lay down an immutable law. Each case is fact specific. It may be, for example, that parties agree in correspondence that agreement has been reached, and signatures are not required. It may be that parties do not sign, but clearly consider themselves bound and act accordingly. But in this case, it seems to me to be unreasonable for an agreement to be formally binding upon W in the absence of her signature when that very same agreement expressly, and in terms, only takes effect upon both parties signing. The purpose of such agreements is to achieve as much certainty as possible, and it strikes me as unfair for W to be strictly held to a document which was carefully drawn up to require, as an express clause of the agreement, both parties' signatures.***

40. ***I am satisfied therefore that it is not a formally arrived at agreement in the Radmacher sense, whereby the presumption is that it should be given effect to unless in the circumstances it would not be fair to hold W to its terms. In other words, I decline to find that it binds W unless she can demonstrate it operates unfairly.***

41. ***But nor am I willing simply to discard and ignore it, as W submits. To do so runs contrary to the s25 requirement to take account of all the circumstances of the case. Although not a strict Radmacher agreement, this was an agreement reached by the parties, with the benefit of legal advice, and upon full disclosure. Even though W did not sign it, in my judgment I am entitled to take it into account and attach such weight to it as I think fit. It is one of the factors, to be considered in the mix. The terms agreed in 2017 are relevant, albeit not determinative.***

42. *I therefore conclude that:*

    *i) The Post-Marital Agreement is not vitiated or tainted by undue pressure or duress.*

    *ii) The absence of W's signature, in circumstances where she consciously decided not to sign, takes the agreement outside the Radmacher category of cases.*

    *iii) The agreement falls to be considered as one of the factors in this case, but it is not presumptively dispositive as would be the case if it fell into the Radmacher category.*

**Additional** - **Take-home**

Mr Justice Peel started the Judgement with the following Introductory comments:

*"I feel obliged to make some comments about the preparation for trial of these financial remedy proceedings:"*

He referred to the High Court Statement of Efficient Conduct of Financial Remedy Proceedings and PD27A / and referenced a number of procedural ills:

- The length of statements and their contents, straying from evidence and amounting to a "rummage through the attic" of the marriage in ***G v G [2002] EWHC (Fam) 1339.***
- Bundle issues, a week before the hearing, and additional bundle consisting of a 102 pages of narrative comments by W materialised together with fresh property particulars.
- After the exchange of skeleton arguments H then lodged updating disclosure which was not agreed, resulting in competing composite schedules being lodged by the parties
- The working day before the hearing, H served on W a voluminous financial analysis of matrimonial expenditure through the parties' joint account in 2018 and 2019.

The message from Mr Justice Peel being clear, that procedure must be abided by and last-minute litigation won't assist clients and will no longer be tolerated by the courts.

**Traharne v Limb [2022] EWFC 27 (31 March 2022)**

*Traharne v Limb [2022] EWFC 27 (31 March 2022) (bailii.org)*

**Facts of the case:**

This case concerned a Final hearing in W's financial remedies application in which argument centred on a post-nuptial agreement entered into by the parties shortly prior to separation.

In this case, the W took the undue pressure argument to a new level and mounted a conduct argument that she had been subjected to coercive and controlling behaviour, perpetrated by H, to the extent that she was unable freely to enter into the Post Nuptial Agreement. Her case being therefore that it was vitiated and should be afforded no effect.

The case generated multiple interlocutory hearings and huge expense. A single joint expert was appointed to opine as to W's state of mind and ultimately, W drafted a Scott Schedule detailing 14 different types of abuse she considered fell under the umbrella of controlling and coercive behaviour.

The elephant in the room being that the PNA did not provide for W's long-term needs and therefore the crux of the case was very much missed by the lawyers.

Sir Jonathen Cohen gave a very helpful ruling that controlling and coercive behaviour plainly falls within the Edgar criteria and that had Ormrod LJ written his judgment today, he might have employed those words as modern terminology.

Again, the case nicely summarises the relevant law at paragraphs 24 – 27:

**The law**

**24. The starting point of the law on agreements is the well-known case of Edgar v Edgar [1981] 2 FLR 19 where at page 25 Ormrod LJ said:**

***To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.***

**25. The Edgar approach was approved by the Supreme Court in Radmacher v Granatino [2010] 2 FLR 1900 where Lord Phillips said at paragraph 71:**

***In relation to the circumstances attending the making of the nuptial agreement, this comment of Ormrod LJ in Edgar v Edgar at p 1417, although made about a separation agreement, is pertinent:***

> ***"It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage."***

***The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.***

**26. I have been asked to consider whether coercive and controlling behaviour, if proved, falls within the pre-existing Edgar criteria or whether it represents a new category of circumstances which can vitiate/taint an agreement.**

**27. In my judgment, Ormrod LJ's words are as relevant now as they were when uttered over 40 years ago. They stand the test of time. Coercive and controlling behaviour would plainly be an example of undue pressure, exploitation of a dominant position or of relevant conduct. It would be part of all the circumstances as they affect the two parties in "the complex relationship of marriage". If Ormrod LJ were writing his judgment today, he might have employed words such as "coercive and controlling behaviour".**

**Additional** - **Take-home:**

- Consequently, the court found that the exploration of W's allegations had been 'entirely unnecessary'; paragraph 54, and her costs expenditure of £403,150 was criticised as 'woefully excessive', paragraph 91
- In light of (a) her misconceived conduct argument and (b) a failure to respond constructively to H's realistic open offer, she was left with a costs liability of c.£80,000 in calculating the final lump sum ordered.

It is clear therefore from last two cases that judicial criticism of case management and preparation is increasingly being expressed via judgements and or costs.

**Collardeau-Fuchs v Fuchs [2022] EWFC 6 (November 2022)**

***https://www.bailii.org/ew/cases/EWFC/HCJ/2022/6.html***

**Facts of the case:**

H was a billionaire real estate developer and the parties were lucky enough to have 'lived a billionaire lifestyle'.

The 2012 postnuptial agreement had been modified in 2014 as a 'birthday gift' for the wife(!)

W's entitlement under the PNA was £37. 5m comprising London home and balance of £23m available to meet income needs (on a 'reverse Duxbury' this gave her £1m pa, reducing on retirement).

Although the H's application was a notice to show cause in respect of the Post-Nup, W was not in fact arguing that she was not bound by the PNA, but there was considerable dispute over the interpretation of a number of aspects of it particularly over level of support for their two young children.

The document had been clearly drafted and stated explicitly in bold uppercase letters that by signing the agreement the parties understood that:

'***EACH PARTY TO THIS AGREEMENT FULLY UNDERSTANDS AND AGREES THAT HE OR SHE IS RELINQUISHING VALUABLE PROPERTY RIGHTS BY SIGNING THIS AGREEMENT."***

Ultimately 17 different issues were identified as needing clarification which were distilled into a Scott Schedule and eventually collated into 10 areas for Mr Justice Mostyn to tackle, which he duly did:

**Judgement:**

*1.b Applications by the husband dated 15 April 2021 that the wife do show cause why a prenuptial agreement ("PNA") dated 2 March 2012 (as modified on 23 March 2014 after the marriage) should not be made an order of the court;*

*3. Although the husband maintains that the wife has come close during the course of the proceedings to repudiating the terms of the modified PNA, her clear stance before me is that she accepts its binding nature. However, the parties do not agree on the interpretation of the modified agreement and leave me to resolve their differences.*

*4. Therefore, I have to decide two matters:*

*a.**The correct entitlements of the wife under the modified PNA and their value**. Although the agreements are governed by New York law, I have not been burdened with any legal arguments about the meaning of the agreements. Rather, I have been asked to construe, by reference to the ordinary meaning of words, common sense, and the intentions of the parties, what the agreements, properly interpreted, provide for the wife.*

***The PNA:***

*20. The parties executed the PNA in accordance with the law of the State of New York on 2 March 2012, some six weeks before the marriage. As stated above, the husband's net worth was disclosed in the sum of $1,018,215,671. The wife's net worth was stated to be $4,471,500. Both parties had advice from, and were represented by, distinguished lawyers and there has been no suggestion of deficiency or pressure within the process leading up to the execution of the PNA.*
*21. The parties signed a subsequent Modification Agreement on 23 March 2014. In her evidence, the wife described how this was presented to her in completed form as a birthday present. It increased the financial provision to be made to the wife pursuant to the PNA. As with the PNA, there has been no suggestion that the process leading to its execution was in any way flawed.*
*22. The PNA creates a regime of separate property and includes a waiver of spousal maintenance claims in consideration of the provision made in the agreements. The key features of the agreements are as follows:*
*a. The preamble to the PNA states that it is intended to be in full satisfaction of all the parties' rights arising out of the marriage or its dissolution except with respect to issues relating to custody and child support of any children of the marriage. To reinforce their mutual intention, the PNA concludes by stating in Article 17, in uppercase and in bold type:*
***"EACH PARTY TO THIS AGREEMENT FULLY UNDERSTANDS AND AGREES THAT HE OR SHE IS RELINQUISHING VALUABLE PROPERTY RIGHTS BY SIGNING THIS AGREEMENT."***

*b. The parties acknowledged that they had received independent legal advice and that each had made clear and comprehensible financial disclosure (Article 2 and Exhibits A and B).*
*c. Separate property is defined in Article 3 and any claims in respect of such property is waived in Article 4.*
*d. The right to claim maintenance or alimony is waived in Article 5.*
*e. Article 6 establishes the rights that arise on an Event of Marital Dissolution, which is defined, for the intents of the case before me, in Article 11 as the commencement of divorce proceedings by either party. That occurred on 22 December 2020, and so for the purposes of the PNA this was a marriage of 8¾ years (to be exact, 103 months). An important provision is article 6.2.1 which permits the wife, in the event of the breakdown of the marriage, to remain in the primary residence of the parties until the youngest child of the marriage attains 21 years of age, with the husband discharging the mortgage repayments, and paying for major repairs and the household staff, with the wife bearing all other expenses of the property.*
*f. The terms of Article 6 are of central relevance to the dispute that I have to resolve and will be addressed in detail later in this judgment.*
*g. Article 13 provides that on the occurrence of an Event of Marital Dissolution, the husband shall pay the wife's legal fees necessary to resolve all issues between the parties, including issues relating to child custody, access and child maintenance, but capped at $750,000. Further, it provides that if either party should commence proceedings to set aside the agreement, or to claim spousal support other than in accordance with the terms of the agreement, then that party shall pay all the legal costs of the other party.*
*h. Article 16.3 provides that the agreement, its validity and interpretation, and the rights of the parties under it, shall be governed and construed under the laws of New York.*
*i.The Modification Agreement provides that on the first happening of an Event of Marital Dissolution, or the wife becoming a US citizen, the husband will transfer to the wife a one-half interest in the Miami apartment and the residence in Southampton, New York.*

***The disputes about the agreement:***

*23. Notwithstanding the detail and clarity of the modified agreement, there are numerous disputes between the parties as to its true meaning. I required the issues to be expressed narratively in a Scott Schedule and numerically in a spreadsheet ("the Outcome Schedule").*
*24. On the face of it there are 17 separate issues, although Issue 17 is nothing to do with the interpretation of the agreement. Further, I think that some of the issues are duplications. One issue was resolved by agreement on the last day of the hearing. I consider there are 10 separate issues, to which I now turn.*

**Take-home:**
-The need for clear drafting, despite there being no vitiating factors, the court was still required to interpret the meaning of the document on over 17 issues, generating a huge element of uncertainty.
- The more recent the agreement, the more forceful the contents of it are. *(One of the reasons that the case of WC v HC (Financial Remedies Agreements) (Rev1) [2022] EWFC 22 (22 March 2022) resolved as it did was because the draft Post Nuptial agreement provided the court with evidence of what the parties had only very recently considered to be an acceptable level of settlement and so the eventual award did not stray too far away as a consequence.)*
- Therefore, over the passage of time there may be the need for a modification agreement. It may be a good way for repeat business to build in a 5year health check as part of a review service.
- However, only refer to a review document in the original agreement if you absolutely intend to go onto action one. In *WC v HC* – a source of contention that one not executed as the initial agreement intimated and therefore questions as to whether the original had lapsed were able to be raised.
- The case also contains some useful discussion of Sch1 cases on standard of living.

**HD v WB [2023] EWFC2 (13 January 2023)**

**Facts of the case:**

This is yet another very high wealth case with realisable assets almost entirely in W's name exceeding £43m.

Mr Justice Peel was concerned with deciphering the circumstances surrounding a Pre-Nuptial Agreement and the weight, if any, to be attached to it.

H argued vitiating factors and sought for the PNA to be completely disregarded on the basis that it was entered into in undue haste, with insufficient disclosure, no legal advice and dubious authorship.

In terms of the latter point, H attempted to cast aspersion on who had finalised the detail of the document.

He tried to suggest that his computer wasn't password protected, that others had access to it and even tried to advance that some edits were inputted jointly by the parties together.

In order to resolve the matter, an edit trail was conducted, an exercise which is so sensitive that it is able to identify the type of computer and time that the edits were made. Even the punctuation used in a financial context was analysed, akin to a handwriting experts, it being noted that commas instead of full stops were commonly used on the continent and therefore attributable to the H and not the W.

**Judgement: pertinent paragraphs 74 – 83**

74. *In his written statement about the PNA dated October 2021, H said that some amendments were made to the document sent by him to BC on 17 July 2014, but he was "not sure which were made by me". Implicitly, he was saying that someone else had carried out at least some of the amendments, casting doubt on the provenance of the document**. In Replies to Questionnaire dated April 2022, he was presented with the edit search which showed that he had carried out the amendments. He replied that his computer at CD House had one Word licence, was not password protected, was used by W and could have been accessed by W or BC.** However, he acknowledged that it was indeed him who had carried out all the amendments to the document sent on 17 July 2014.*

75. *On 18 July 2014, BC replied to H with an amended version. It included some financial disclosure for W to replace that given by her sister 9 years before. It included a reference to W relying upon the advice given to her sister as their positions were almost identical. It did not amend the substantive provision at clause 24.1 in respect of £250,000 and 25% net profit of CD House as BC wanted to speak to W about it. Later that day BC did speak to W about the PNA (probably by telephone), who said that she would like the 25% net profit to be after development costs and RPI, did not agree to the £250,000 and thought the value of CD House was £8m, not £10m.*

76. *On 19 July 2014, BC emailed H at 10.06 saying "Did you get my amendments or do I have to print them when I come today?" That was a reference to a planned meeting between them that day at CD House.*

77. *The meeting duly took place. W was also at the house, but did not play any direct part in the discussions. BC told me, and I accept, that they had no discussions about the meaning and terms of the PNA because H was, she believed, receiving legal advice on it. It appeared to her that H understood it; at no time did he say to BC that he did not appreciate the terms and intention of the PNA. I reject H's evidence to me that BC told him there was no need to take legal advice as W's sister's lawyers had previously given advice, and time was running out. She said no such thing, not least because she believed H was already receiving legal advice. BC told H that W wanted the £250,000 provision removed from the agreement and placed in the appendices as a liability from W to H (for reasons which nobody can recall, but the arithmetical effect was the same), and inclusion of renovation costs and RPI for CD House before calculation of H's 25% entitlement. BC also thought (albeit only vaguely) that during the meeting mention was made of £1m to £2m cash in W's bank accounts.*

78. *After the meeting, BC went home and amended the document on her computer. In his April 2022 Replies to Questionnaire**, H asserted that they jointly inputted the amendments on his computer at CD House, which I do not accept. The edit trail shows that the amendments were carried out on an HP computer (which BC owned) and not a Dell computer (which H owned). BC included in H's disclosure "Shares?" under the section "property", as she told me, "just in case", and** not, I am satisfied, because she knew of H's business interest. She did not amend the provisions about legal advice which she would surely have done had she truly thought H was not receiving legal advice. She changed the value of CD House to £8m from £10m in accordance with what W had requested. Also as requested, she removed the £250,000 and placed it in the disclosure appendices as a debt owed by W to H.*

79. *In Replies to Questionnaire, H said that after 19 July 2014, he did no further amendments. He told me orally that he did not receive any further amended versions from BC or W.*

80. *On 21 July 2014 at 19.59, H emailed to KW (but, as he accepted, not to W or BC) an amended version of the PNA which was in the same terms as the one sent to him two days previously by BC, save that under the Appendices, it included in his disclosure "33,3% of the value of MM". In oral evidence, H could not accept that it was he who made that amendment. He suggested that it might have been W or BC. I reject his evidence.* ***During the hearing before me, an edit search of this document was carried out which showed that the amendment had been done on H's computer and that the last modification was at 19.56 i.e 3 minutes before he indisputably sent the email with the amended PNA to KW. It is inconceivable that W or BC carried out the amendments on H's computer 3 minutes before H sent the document.*** *Further, the use of the comma in 33,3% is commonplace on the continent (including H's home country) rather than in the UK. And I accept the evidence of W and BC that (i) they did not carry out any amendments using H's computer and (ii) they did not know of H's business interest and therefore could not have added it.* ***H's assertions about other people accessing his computer to make amendments made no sense. Why would W or BC have done so, clandestinely****? Why would BC, instead of using her HP computer, have gone to CD House to use the Dell? Why would W, who was playing no part in the discussions, have contemplated doing amendments herself? These assertions made by H were far fetched and cast doubt on much of his presentation about the PNA.*

81. *H's covering email to KW said: "I have attached it but I am not sure if it is better or not to have you as my signed up lawyer or just get some advice and say I did it by myself". W submitted that this demonstrates H preparing the ground to omit reference to legal advice so as to challenge the PNA later. Although it is a slightly odd email, I am inclined to reject the submission. For a start, H did* ***not*** *in fact receive legal advice, although he had the opportunity to take it. So, to think about omitting reference to legal advice would gain nothing in attempting to evade the consequences of a PNA. Further, it was he who had included amendments on disclosure which arguably strengthened the PNA. No other email points to mala fides. In any event, having heard H, I am confident that he was not attempting a Machiavellian ruse of this nature, despite W's suspicions to that effect. What it does demonstrate is that even at that stage H was considering whether or not to obtain legal advice, which he ultimately did not do.*

82. *The final version, dated 26 July 2014 (the wedding day), must have been prepared by H. It included, word for word, his disclosure of his business interest which had been sent to KW, but not to W or BC. It deleted the reference to H having received legal advice from KW, presumably because he had not in fact received legal advice. It included a value of £1m-£2m for W's cash which, in my view, must also have been inserted by H and not, as H suggested, by BC or W; I assume that somebody mentioned this figure at some point. Had W carried out that amendment, she would have been more precise. Again, I reject any intimation by H that W or BC in some way effected these changes.*

83. *The circumstances of the wedding day are confused. Having heard the evidence, it seems to me to be most likely that H brought a copy of the final version of the PNA. He signed it in front of a witness, who then took it to W. Had it been the other way round, i.e W bringing it to the wedding, she would have signed first, before having it taken over to H; that is not what happened. It was left on a table and seen by BC who took it away and kept it in a drawer. It is likely that W's signature witness, a long standing family associate, signed it at a later date, although nobody could recall. I accept that W did not read it, thinking it was the same as the version as the one sent by BC on 19 July 2014. H also told me he did not read it, but he had no need to do so as he had prepared the final draft. Thus, W was unaware of the subsequent amendments made by H, including (i) removal of the references to legal advice*

*having been given to H and (ii) insertion of H's MM interest. It was only in 2020, when she retrieved the PNA from her mother to send to H as the marriage was breaking down, that she saw these changes. H said in written evidence that on the wedding day he was told by somebody who he cannot remember (but not W or BC) that he had to sign or W would not marry him. True, he was not cross examined on this, but then it was no part of his case that W uttered these words to him on the day, so there was no requirement for him to be cross examined by her counsel on this somewhat vague assertion. In any event, W had undoubtedly said something similar to him in their earlier discussions, so he cannot have been surprised if that is what he was told. That is precisely why he had brought the PNA to the wedding, and signed it.*

**Outcome:**

Peel J concluded that the PNA was not vitiated – it had been freely entered into by the parties with a full appreciation of its meaning and consequences.

Financial disclosure was in broad terms accurate, and W should not be prejudiced by H not having pursued lines of enquiry; paragraph 90.

Whilst H did not take formally take legal advice, he had ample opportunity to do so; paragraph 89 **and therefore a lack of legal advice was not considered a vitiating factor, or so 'fatal' that no weight could be attributed to the PNA paragraph 45**.

Ultimately, yet again, the PNA was departed from on a needs basis.

Mr Justice Peel expressed his dissatisfaction via his written judgement and costs.

In terms of costs, he ordered H to pay 20% of W's costs which even after some revision amounted to a hefty £120,000! The case provides a helpful overview of costs at para 116 – 119.

**Costs**

116. After I sent out the judgment in draft, I heard applications by each party for costs orders. H seeks the sum of £417,000, being his costs incurred since his open offer of May 2022. W seeks 20% of her costs, i.e about £170,000.

117. The starting point for costs in financial remedy proceedings is that each party should bear their own costs. By FPR 2010 28.3(6) the court may depart from the starting point and make a costs order against one, or other, or both parties. Factors to be taken into account are listed at 28.3(6) and include:

> "(b) any open offer to settle made by a party;
>
> (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
>
> (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
>
> (f) the financial effect on the parties of any costs order."

118. Rule 4.4 of Practice Direction 28A states that:

> "The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court".

119. In **Rothschild v de Souza** [**2020] EWCA 1215** the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand. Examples of first instance decisions where the judge made costs order notwithstanding that such order would cause the payee to dip into (and thereby reduce) the needs based award include Sir Jonathan Cohen in **Traherne v Limb** **[2022] EWFC 27,** Francis J in **WG v HG [2018] EWFC 70** and my own decisions in **WC v HC** **[2022] EWFC 40** and **VV v VV** **[2022] EWFC 46**.

**In terms of the PNA - Mr Justice Peel's expressed his distaste with the way that H pursued it at paragraphs 121 – 122:**

**121.** H can point to the fact that I came down against W on her case that H can, and should, access his business interest within 4 years. I made clear findings on this point. On the other hand, W can point to my dissatisfaction with H's presentation (particularly in his Form E) about the value of his business interest, and the 2020 business dividend. **Most significant, however, in my judgment, is H's attempts throughout the proceedings to persuade the court that the PNA should be completely disregarded. That issue occupied a very large amount of the court's time and energy, and infected the whole case. It dominated the proceedings throughout. I found against H, and did not accept his evidence on the disputed circumstances under which the PNA came into being. Had he not challenged the PNA in this way, I am confident that the proceedings would have been significantly shorter and less expensive.**

122. **In my view, H must bear some of the costs, principally because of his approach to the PNA**. **Doing the best I can, it seems to me that a payment by him of 20% of W's costs is reasonable.** I will, however, apply a discount of 30% to the figure of £170,000 which is sought, to reflect a notional deduction for the standard basis of assessment. **Thus, H shall pay £120,000 towards W's costs,** such sum to be netted off against the lump sum provision which I have made in his favour. I consider that it is reasonable and proportionate to invade, to that extent, the needs based award made by me in his favour. **He cannot be insulated from the consequences of litigation.** For the avoidance of doubt, I decline to make a costs order against W in favour of H, an application which I thought was ambitious.

**Take-home:**

I gave another talk recently in which I largely focussed on the case of *X v Y [2022] EWFC 95,* another instance where a H's case relied on forged documents, but I approached it from the assumption that your client is being presented with dubious evidence from the other side.

This case, however**,** made me think about – what if it is your client who persists in presenting dubious evidence?

When strategizing how to put your case, if your client persists in presenting dubious evidence, give clear advice as to the potential outcome, cost ramifications and make sure all recorded on file.

Link to handout: *Financial-Remedy-Update.-Validity-of-documents-Disclosure-Conduct-and-how-we-as-practitioners-are-to-navigate-this-veritable-nightmare-in-an-unregulated-vacuum.-Cerys-Sayer.pdf (westgate-chambers.co.uk)*

**Conclusion**

i. If presented with a pre/post-nup remember need will trump all.

ii. Ensure that the agreements are thoroughly discussed and considered before being drafted.

iii. Ensure that disclosure is comprehensive, clear and flows in both directions. Be transparent about what wealth there is and what you wish to ringfence. Questions can be exchanged if you feel further information is required from the other party.

iv. Both parties should receive independent legal advice from lawyers who are experienced in this area.

v. Clear drafting and clauses within the agreements and consider supporting certificates.

vi. Ensure the documents are finalised well ahead of the legal ceremony. Subsequent suggestion of rushing or pressure may undermine the agreement. Consider conclusion of the document 28 days ahead of the marriage.

vii. Consider updating the agreements, within approximately 5 years but don't say you will if you don't intend to.

viii. Controlling and coercive counts as Undue pressure

ix. Be alive to the providence of documents, consider if they have been manipulated and remember the edit trail.

x. Good practice, observe the procedural rules and the efficiency statement.

xi. Criticism in judgements is punishment enough let alone costs!